United States District Court

Eastern District of California

Nyles Lawayne Watson,

Plaintiff, No. Civ. S 02-1777 DFL PAN P

vs. Findings and Recommendations

State of California, et al.,

Defendants.

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Plaintiff is a state prisoner without counsel litigating a civil rights action against prison officials.

The case proceeds on the January 14, 2003, third amended complaint against defendants Pliler, Johnson, Wai and Kofoed.

Plaintiff claims that while confined at California State Prison Sacramento (CSP--Sacramento) he was injured when a staple gun fell on his wrist. He claims defendant Dr. Johnson misdiagnosed the injury for many months, defendant Nurse Wai repeatedly rejected plaintiff's requests to see a doctor and

defendant Warden Pliler knew of the injury and gross negligence of her medical staff and failed to remedy them. Plaintiff claims that at California State Prison Solano (CSP--Solano)defendant Dr. Kofoed eventually operated on the wrist but failed to prescribe physical therapy and that as a result plaintiff lost some of the mobility in his wrist.

Wai, Pliler and Kofoed moved February 23, 2005, for summary judgment. Plaintiff opposed.

Standard on Summary Judgment

A party may move, without or without supporting affidavits, for a summary judgment and the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a)-(c).

An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A fact is "material" if it affects the right to recover under applicable substantive law. Id. The moving party must submit evidence that establishes the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion and

identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any'" that the moving party believes demonstrate the absence of a genuine issue of material fact. Id., at 323. If the movant does not bear the burden of proof on an issue, the movant need only point to the absence of evidence to support the opponent's burden. To avoid summary judgment on an issue upon which the opponent bears the burden of proof, the opponent must "go beyond the pleadings and by her own affidavits, or by the "'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id., at 324. The opponent's affirmative evidence must be sufficiently probative that a jury reasonably could decide the issue in favor of the opponent. Matsushita Electric Industrial Co., Inc. v. Zenith Radio Corporation, 475 U.S. 574, 588 (1986). When the conduct alleged is implausible, stronger evidence than otherwise required must be presented to defeat summary judgment. Id., at 587.

Fed. R. Civ. P. 56(e) provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Nevertheless, the Supreme Court has held that the opponent need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, 477 U.S. at 324. Rather, the questions are (1) whether

the evidence could be submitted in admissible form and (2) "if reduced to admissible evidence" would it be sufficient to carry the party's burden at trial. Id., at 327. Thus, in Fraser v. Goodale, 342 F.3d 1032 (9th Cir. 2003), objection to the opposing party's reliance upon her diary upon the ground it was hearsay was overruled because the party could testify to all the relevant portions from personal knowledge or read it into evidence as recorded recollection.

A verified complaint based on personal knowledge setting forth specific facts admissible in evidence is treated as an affidavit. Schroeder v. McDonald, 55 F.3d 454 (9th Cir. 1995); McElyea v. Babbitt, 833 F.2d 196 (9th Cir. 1987). A verified motion based on personal knowledge in opposition to a summary judgment motion setting forth facts that would be admissible in evidence also functions as an affidavit. Johnson v. Meltzer, 134 F.,3d 1393 (9th Cir. 1998); Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004). Defects in opposing affidavits may be waived if no motion to strike or other objection is made. Scharf v. United States Attorney General, 597 F.2d 1240 (9th Cir. 1979) (incompetent medical evidence).

Undisputed Facts

November 16, 2000, at CSP--Sacramento, plaintiff injured his left wrist when a staple gun fell on it. Defendant Wai, a nurse, examined the wrist and determined it was bruised and swollen but that plaintiff could bend and move it. Wai prescribed ice, an ace bandage, Motrin, and told plaintiff to return to the clinic

as needed.

November 29, 2000, plaintiff returned to the medical clinic with complaints his left wrist hurt and requested an x-ray. Defendant Dr. Johnson examined him and diagnosed wrist trauma a few weeks prior. Dr. Johnson noted in the medical file that it was "OK to wait" on any further treatment. Plaintiff received pain medication.

Plaintiff transferred from CSP--Sacramento December 14, 2000, to attend court in San Joaquin County. He was confined at the county jail until July 2, 2001, when he returned to CSP--Sacramento. Jail medical staff informed plaintiff June 21, 2001, he had a benign ganglion cyst on his left wrist.

August 7, 2001, plaintiff was scheduled to see a doctor for treatment. August 8, 2001, Ibuprofen was prescribed for 30 days. August 22, 2001, plaintiff submitted a grievance complaining about his medical treatment at CSP--Sacramento and requested an investigation by the warden.

August 31, 2001, Dr. Penner examined plaintiff at CSP--Sacramento for complaints of wrist pain. Dr. Penner noted mild swelling but no inflammation. He considered rupturing the ganglion cyst but concluded surgical intervention was not required and prescribed pain medication.

September 5, 2001, plaintiff again saw a doctor, complaining of the ganglion cyst on his wrist.

September 14, 2001, plaintiff again saw a doctor who noted the cyst was slowly increasing in size. The doctor diagnosed a

ganglion cyst and aspirated it by inserting a needle and drawing out fluid.

September 25, 2001, an x-ray and surgical consultation were ordered.

October 2, 2001, plaintiff was transferred to CSP--Solano. He continued to complain of pain and a lump in his left wrist.

At CSP--Solano Dr. Kofoed, an orthopedic surgeon, first examined plaintiff in November 2001. Dr. Kofoed diagnosed a ganglion cyst which other physicians had been treating conservatively. Kofoed performed the surgery April 23, 2002. Afterward, Dr. Kofoed gave plaintiff a brace to immobilize the wrist and ordered a 29-day "lay-in" to allow the wound to heal and plaintiff to recover from surgery. Kofoed specifically considered the risk of harm from physical therapy and decided against it.

Analysis

"The unnecessary and wanton infliction of pain upon incarcerated individuals under color of law constitutes a violation of the Eighth Amendment . . ." McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1991). A violation of the Eighth Amendment occurs when prison officials deliberately are indifferent to a prisoner's medical needs. Id. The threshold for a medical claim under the Eighth Amendment is extremely high:

> A prison official acts with "deliberate indifference . . . only if [he] knows of and disregards an excessive risk to inmate health and safety." Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1187 (9th Cir. 2002) (citation and internal quotation marks omitted). Under

> this standard, the prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but that person "must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "If a [prison official] should have been aware of the risk, but was not, then the [official] has not violated the Eighth Amendment, no matter how severe the risk." Gibson, 290 F.3d at 1188 (citation omitted). This "subjective approach" focuses only "on what a defendant's mental attitude actually was." Farmer, 511 U.S. at 839. "Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights. McGuckin, 974 F.2d at 1059 (alteration and citation omitted).

Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (footnote omitted).

A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Id. (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A prisoner has a "serious" need for medical treatment if she has an injury that a reasonable doctor or patient would find important and worthy of comment or treatment, a medical condition that significantly affects her daily activities, or chronic and substantial pain. Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir.1990)).

Delay in medical treatment amounts to deliberate indifference if (1) it seriously affected the plaintiff's medical condition and (2) defendants were aware the delay would cause serious harm. Shapley v. Nevada Board of State Prison Commissioners, 766 F.2d 404, 408 (9th Cir. 1985).

In seeking summary judgment, Dr. Kofoed, Nurse Wai and

Warden Pliler submit evidence that a ganglion cyst is not a medical condition requiring urgent care, nor is it serious or life-threatening. Dr. Kofoed submits evidence that physical therapy is not medically appropriate following surgery to remove a ganglion cyst.

In opposition, plaintiff submits evidence he still was wearing a wrist brace on March 22, 2005. Plaintiff testified at his deposition that he continues to suffer pain and decreased mobility in his wrist and he is substantially restricted in his ability to lift objects.

The court assumes without deciding the ganglion cyst on plaintiff's left wrist amounted to a serious medical condition. Even so, plaintiff has established negligence, at most, in treatment for his medical needs. "Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights." McGuckin, 974 F.2d at 1059 (alteration and citation omitted). Plaintiff submits nothing but his lay opinion that treatment for his ganglion cyst was inappropriate. Dr. Kofoed performed surgery but did not prescribe physical therapy because he believed it was not medically appropriate. Neither Nurse Wai nor Dr. Kofoed were deliberately indifferent to plaintiff's serious medical needs. When plaintiff left CSP--Sacramento in December 2001, his condition was unremarkable. Between July 2 and November 2001, plaintiff received regular care for the wrist including pain medicine, aspiration, and referral to an orthopedic specialist.

Only nine months transpired between the time officials at CSP--Sacramento knew the cyst had developed and surgically removal. There is nothing to support a conclusion plaintiff's condition was aggravated by this nine-month delay.

Warden Pliler declares she was not at CSP--Sacramento from January through August of 2002 and first learned of plaintiff's claims in the course of this litigation. Plaintiff offers nothing to controvert this or otherwise establish Warden Pliler somehow participated in the claimed violation of his constitutional rights.

Based on the foregoing, the court hereby recommends defendants' February 23, 2005, motion be granted and summary judgment be entered for defendants Wai, Pliler and Kofoed.

Pursuant to the provisions of 28 U.S.C. § 636(b)(l), these findings and recommendations are submitted to the United States District Judge assigned to this case. Written objections may be filed within 20 days of service of these findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge may accept, reject, or modify these findings and recommendations in whole or in part.

Dated: August 11, 2005.

/s/ Peter A. Nowinski
PETER A. NOWINSKI
Magistrate Judge